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In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

BRIEF OF AMICI CURIAE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Alliance of Automobile Manufacturers, Inc. (Alliance) is a nonprofit trade association composed of 10 car and light truck manufacturers: BMW Group, Daimler-Chrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motors North America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., and Volkswagen of America, Inc. Alliance members account for more than 90 percent of U.S. vehicle sales.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade organization whose members include American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Maserati North America, Inc., Mitsubishi Motors North America, Nissan North America, Peugeot Motors of America, Saab Cars USA, Renault, SA, Subaru of America, and Toyota Motor Sales, U.S.A. AIAM also represents original equipment suppliers and other automotive-related trade associations.[1]

The members of the Alliance and AIAM – automotive manufacturers and suppliers – may be the most affected by the punitive damages laws of this country. The products they

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by the Alliance and AIAM and was written entirely by their counsel.

make – automobiles – move fast and crash, and severe injuries can occur in them in all kinds of ways even when they are perfectly designed. And under principles of both law and engineering, the designs manufacturers choose must reflect judgment calls about risks and benefits, which by definition make risks to some more likely if risks to others are to be avoided. Members of the Alliance and AIAM are frequently sued by injured people who seek, based on their particular injuries, to have their cars deemed defective by lay juries – often advocating as alternatives the very designs attacked by others. And plaintiffs often ask the jury, based on the isolated facts of their case, to punish the manufacturer for design decisions made years (sometimes decades) before.

This scenario is played out again and again, in court after court, state after state, design after design. And the results are, truly, random. Designs deemed non-defective in one case are found defective and punishable in another. And the punitive amounts – although spiraling ever upward – bear no relationship to anything except jury whim.

This Court's cases have sought to clarify the Constitution's limits on the availability and size of punitive damages and the territorial scope of a state's power to impose them. But at least in the field of automotive product liability, those limits have not prevented arbitrary imposition of punitive damages. The members of the Alliance and AIAM accordingly have a strong interest in the Court's consideration of *Ford Motor Co. v. Romo,* No. 02-1097, and

Ford Motor Co. v. Smith, No. 02-1096[2] (as well as *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002), in which a petition for a writ of certiorari is soon to be filed), as they provide an opportunity to resolve the constitutional issues concerning punitive damages in product liability cases.

SUMMARY OF ARGUMENT

The *Romo* and *Smith* petitions give the Court an opportunity to provide badly needed guidance to end what is now a rule of essentially random imposition of punitive damages, in randomly large amounts, against product manufacturers. The automotive industry has been building ever safer cars, but facing ever greater punishment. The verdicts are arbitrary: designs that meet federal safety standards promulgated by the National Highway Traffic Safety Administration (NHTSA) are deemed dangerous and punishable; designs exonerated by one jury are deemed grounds for punishment by another. And the amounts awarded are untethered to any rational basis – a design found to have caused death may trigger punishment of $3 million to over $1 billion. Such irrational results and random punishment do not, and by their nature cannot, accomplish the legitimate purposes of punitive damages, and indeed, occasion the arbitrary deprivation of property that the Constitution condemns. This Court's guidance is badly needed.

[2] Given the similarity of issues in *Romo* and *Smith*, the Alliance and AIAM are filing similar briefs supporting petitioner in each case.

ARGUMENT

The twin cases before the Court – *Romo* and *Smith* – are not aberrations. The automotive industry has been subjected to random imposition of punitive damages, in huge amounts, with respect to designs that meet industry standards, that exceed federal safety standards, that NHTSA itself has investigated and not found defective, and that have been found safe by other juries. A punitive damages system that allows such "arbitrary deprivation of property" and punishment by definition does not meet due process. *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994). Punitive damages law is broken. These cases provide the Court with an opportunity to fix it.

The sole purposes of punitive damages are to punish past, and deter future, wrongdoing. *Cooper Indust., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432 (2001); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21-22 (1991). Both purposes depend on reasonable notice of what conduct will trigger punishment. A manufacturer cannot be deterred from one design choice and encouraged to adopt another unless it can foresee which choice will trigger, and which will avert, punishment. Indeed, it is simply unfair to punish a manufacturer for conduct that was, or reasonably appeared, lawful when and where it occurred. Yet, in a product design setting, where designs and legal tests for defect are based on engineering trade-offs and judgment calls, notice of what is and is not a proper design is, in the best of circumstances, elusive.

Punitive damages in product cases – especially the massive awards in cases like *Romo* and *Smith* – reflect the problem. As the Court cautioned in another automotive case, "Punitive damages pose an acute danger of arbitrary

deprivation of property" and juries may "use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg,* 512 U.S. at 432. Automobile manufacturers are large companies. Some are foreign manufacturers to boot. These companies' wealth, and distance from individual juries, put them at risk for unwarranted punishment, especially where plaintiffs are sympathetic and injuries are severe.

The Court in *BMW of North America v. Gore,* 517 U.S. 559 (1996), articulated minimum Due Process requirements designed to assure that punitive damages fairly served their purposes without arbitrary, unfair punishment. "Elementary notions of fairness," the Court held, entitle a defendant to "fair notice not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. The Court laid down three guideposts for measuring punitive damages under the Due Process Clause. 517 U.S. at 574-85.

The *Gore* standards, however, developed in a case involving economic loss, have not controlled runaway verdicts in personal injury product liability litigation. Juries continue to impose – and courts continue to affirm – unpredictable, even conflicting, punishments, often for good-faith conduct, apparently lawful at the time. The result is arbitrary punishment, without reasonable notice of what conduct will be punished, or how much, or how to avoid punishment in the future.[3]

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[3] It is no answer to say that manufacturers have notice they should avoid defective designs. The test for defect involves judgment calls

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The Alliance and AIAM file this brief to alert the Court to what is really happening to the automotive industry without meaningful punitive damages controls, so the Court can understand why the *Romo* and *Smith* cases represent both a real and pervasive problem in the lower courts, and an opportunity for this Court to correct that problem.

I. UNPREDICTABLE, CONFLICTING PUNITIVE DAMAGES AWARDS.

As this Court observed in *Gore,* "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In actual practice, however, the current constitutional standards permit irrational and even contradictory results, especially in product liability cases where manufacturers cannot avoid design tradeoffs. Such random punishment does not – and by definition cannot – accomplish any legitimate purpose.

For example, in *Smith,* the Kentucky Supreme Court reinstated a $15 million punitive damages award based on a transmission design susceptible to shifting from Park to Reverse. This misshift risk cannot be eliminated from an automatic transmission; as a matter of physics, there is a

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about safety, utility and cost that are subject to debate. A manufacturer choosing a design cannot predict whether a jury in some future case will deem that judgment call reasonable or punishable. In practice, juries do both.

midpoint between Park and Reverse. At least 15 juries had found Ford's transmission not defective at all and the federal safety agency, the National Highway Traffic Safety Agency (NHTSA), had specifically investigated and not found any defect. (*See Smith* Petition at 6-7) In addition, the Virginia Supreme Court had held punitive damages unavailable as a matter of law in a similar misshift claim against Ford, even as it affirmed compensatory liability. *Ford Motor Co. v. Bartholomew,* 297 S.E.2d 276, 683-84 (Va. 1982); *cf. General Motors Corp. v. Sanchez,* 997 S.W.2d 584, 595-98 (Tex. 1999) (affirming compensatory liability but holding punitive damages unavailable as a matter of law in misshift claim against General Motors). Thus, different juries and courts have variously found misshift susceptibility not to be a defect at all; defective but not punishable; and punishable.

And in *Romo,* the California Court of Appeal reinstated a $290 million punitive damages verdict for a roof design in use for a quarter-century, that had never been found defective in any case – and in fact, far from causing widespread harm, had never even been the subject of a lawsuit, much less a judgment. Indeed, the roof design was ahead of its time, far surpassing federal roof-strength regulations first adopted several years later – regulations that, by definition, "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a).

The *Romo* and *Smith* cases do, and should, give pause about the need for additional guidelines to protect against arbitrary punishment. Due process should foreclose punishment when different engineers (and juries) can reach different conclusions on a design's merits. For by definition, where reasonable minds can believe a design is safe, there is no basis for finding wantonness in its use,

and no way to predict its adoption will be punished. Due process should foreclose punishment when a manufacturer complies with an on-point federal standard. For Congress has mandated that NHTSA adopt standards that are "practicable" and "meet the need" for motor vehicle safety. 49 U.S.C. § 30111(a). Compliance with an on-point safety standard, even if not a defense as a matter of law to liability, by definition negates the evil intent required for punitive damages and makes punishment inappropriate; indeed, a finding that a complying design reveals evil intent is an ad hoc indictment of NHTSA's own good faith – something no case should allow and no manufacturer should be charged with predicting. Without these kinds of constitutional safeguards, irrational and arbitrary punishment will be routine.

Indeed, *Romo* and *Smith* are not unique; they are the norm. Take the case of Nissan's experience with claims of "unintended acceleration" in its 300ZX car. "Unintended acceleration" is when a car accelerates when the driver does not intend it to accelerate. Most all cars have been the subject of such claims. The problem is most often pedal error: the driver hits the gas instead of the brake. Nissan had won at least three jury verdicts, two directed verdicts and a summary judgment in cases alleging a defect-caused unintended acceleration in Nissan's 300ZX car.[4] After

[4] *Ammel v. Nissan Motor Co., Ltd.*, San Diego County (Calif.) Superior Court No. 577345 (Feb. 20, 1991) (jury verdict of no design defect); *Silverman v. Swenson*, Orange County (Calif.) Superior Court No. 522924 (Nov. 5, 1991) (jury verdict of no design defect); *Rinck v. Nissan Motor Co.*, Hamilton County (Tenn.) Circuit Court No. N-33587 (July 30, 1990) (jury verdict for Nissan); *Robertson v. Nissan Motors Corp. in U.S.A.*, Los Angeles County (Calif.) Superior Court No. C666570 (Aug. 13, 1991) (directed verdict); *Gallo v. Nissan Motor Corp.*,

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investigation, Nissan believed the reports were caused by pedal error. NHTSA also had investigated such claims in hundreds of 300ZX cars, found "no safety related defect," and also determined that incidents were likely caused by pedal error. Far from ignoring the problem, Nissan committed $30 million to retrofit the cars to protect against pedal error. Nonetheless, in *Nissan Motor Co., Ltd. v. Armstrong,* 32 S.W.3d 701, 710-11 (Tex. App. 2000), *pet. for review filed* (Tex. Feb. 21, 2001) (No. 01-0030), a Texas jury held that the same unintended acceleration incidents, which NHTSA and Nissan found to be caused by drivers' pedal errors, proved a throttle design defect. The jury then imposed punitive damages on the theory that Nissan was indifferent to safety because it agreed with NHTSA on the likely cause of the incidents and committed $30 million to addressing that cause, rather than changing a throttle part that neither thought was the cause. The Texas Court of Appeals affirmed a $2 million punitive damages award.

Clark v. Chrysler Corp., 310 F.3d 461 (6th Cir. 2002), is another example of punitive damages gone awry. There, a car's door latch separated in a collision, allowing the door to open, and plaintiff's decedent to be ejected from the vehicle. NHTSA had adopted a standard for door latch strength, a standard explicitly designed "to minimize the likelihood of occupants being thrown from the vehicle as a result of impact." 49 C.F.R. § 571.206 S1. Chrysler's latch was twice as strong as NHTSA's standard required. Nonetheless, a jury imposed punitive damages and the

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Los Angeles County (Calif.) Superior Court No. SEC63128 (Apr. 19, 1990) (directed verdict); *Bonanno v. Jordan,* United States District Court for the District of Vermont No. 2:92-CV-333 (Aug. 30, 1991) (summary judgment).

Sixth Circuit (over dissent) affirmed them, on the ground that NHTSA's strength requirements were not adequate for real accidents. 310 F.3d at 469, 481; *see* 310 F.3d at 483 (Nelson, J., dissenting). Thus, just as manufacturers cannot count on avoiding punitive damages by complying with their own engineering judgments, even when repeatedly validated by juries, neither can they count on NHTSA's independent judgment.

The law, amici respectfully submit, thus affords no real notice of the conduct that will subject a manufacturer to punitive damages if it allows juries to both exonerate and punish a manufacturer for adopting the same design – or to punish as maliciously dangerous designs far exceeding expert standards that already "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a).

Indeed, carmakers are sometimes subject to punitive damages no matter what choice they make. For example, in *Romo*, the punitive damages award was affirmed in part because Ford changed the challenged design. Ford reinforced the roof in a later model year Bronco, which, the California Court of Appeal reasoned, proved Ford acted reprehensibly in using the prior roof in 1978. *Romo* Pet. App. 35a. The message: No good deed goes unpunished. *See also General Motors Corp. v. Johnston,* 592 So.2d 1054, 1060 (Ala. 1992) (affirming, as reduced, punitive damages based on evidence that GM "attempt[ed] to correct the problem" while failing to notify buyers).[5]

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[5] Indeed, this reasoning points up the need for territorial limits on punitive damages. Federal Rule of Evidence 407, and many like state rules, forbid consideration of subsequent design changes on liability. It

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Yet other cases hold punitive damages justified because the manufacturer did ***not*** change the design. *E.g., American Motors Co. v. Ellis,* 403 So.2d 459, 467 (Fla. App. 1981) (punitive damages justified because, although aware of danger, "AMC chose not to implement the recommendation of its engineers to relocate the fuel tank"); *Wangen v. Ford Motor Co.,* 294 N.W.2d 437, 462 (Wis. 1980) (punitive damages appropriate because Ford did not change design of gas tank and surrounding components despite known fire hazard); *see Armstrong,* 32 S.W.3d at 710-11 (affirming punitive damages because Nissan allegedly knew part could fail and cause unintended acceleration, but did not issue mandatory retrofit or special warning).

These cases send exactly the wrong message. They tell manufacturers that even designs found safe by juries or that comply with on-point NHTSA standards that by Congressional mandate must "meet the need for motor vehicle safety" will be punished; that automakers cannot escape punitive damages whether they keep designs or change them; that no matter what choices they make and how often they are vindicated by juries they will be punished eventually in some case; and that punitive damages are accordingly simply a random risk and an inescapable cost of doing business.

That turns the purposes of punitive damages upside down. The law justifies punitive damages on the basis that they are meant to shape conduct. They cannot shape

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is perverse indeed if one state, like California, can impose nationwide punishment based on the very design innovation that federal (and other states') law seeks to encourage and so refuses to punish.

conduct if they are imposed whatever the conduct and no conduct can predictably protect against them. And punishing manufacturers for products they reasonably believed reasonably safe, *i.e.* lawful – which belief was supported by NHTSA standards and investigation reports, industry standards, and numerous jury verdicts – is fundamentally unfair and violates the notice requirement of the Due Process Clause. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated "fundamental principles of justice," even if the defendant "should have known that the Supreme Court of the State in the exercise of its judicial power might hold [its conduct] unreasonable," where "the prevailing view elsewhere was otherwise").

In short, *Romo* and *Smith* are not unique. They reveal a devastating lack of controls on punitive damages in the lower courts, which prevents punitive damages from serving their legitimate purposes – fair retribution and deterrence. The result is the very "arbitrary deprivation of property" that *Oberg* condemns as a violation of due process. The Court should grant review to set specific guidelines, and limits on the availability of punitive damages, that prevent such random punishment.

II. ENORMOUS AWARDS THAT EVISCERATE THE *GORE* FACTORS.

Even where some punitive damages are appropriate, the Due Process Clause "imposes substantive limits" on the amount of punitive damages. *Cooper,* 532 U.S. at 433-34; *Gore,* 517 U.S. at 585-86. In deciding whether the line has been crossed, courts must focus on the defendant's degree of reprehensibility or culpability, the relationship

between the penalty and the harm to the victim caused by the defendant, and the sanctions in other cases for comparable misconduct. *Gore,* 517 U.S. at 575-85; *see Cooper,* 532 U.S. at 440.

Ford's petitions in *Romo* and *Smith* demonstrate that the *Gore* guideposts provide no real or consistent controls on the amount of damages in product liability cases. Perhaps because the *Gore* factors were developed in a case that did not involve personal injuries or engineering judgments, the lower courts in automotive product liability struggle with them. Some cases apply the guideposts, some ignore them, and some discard them. (*Romo* Pet. 9-23; *Smith* Pet. 21-30) The arbitrary award of crushing amounts, on top of random imposition of punitive liability, makes the absence of controls doubly offend due process.

Again, *Romo* and *Smith* are not alone. A single case demonstrates that there is no practical limit on punitive damages in product liability cases. In *Anderson v. General Motors Corp.,* Los Angeles County (Calif.) Superior Court No. BC 116926, *notice of appeal filed,* No. B135147 (Cal. Ct. App. Sept. 9, 1999), people injured in a post-collision fire sued GM, claiming that placement of the gasoline tank behind the rear axle created an excessive danger of fuel-fed fire in the event of a crash. The vehicle met all relevant requirements for rear-end crashworthiness, and the fuel tank was in the same location as 98% of the other vehicles marketed. Nevertheless, the jury not only found the tank defective, it awarded $4,800,000,000 ($4.8 billion) in punitive damages. The trial court, purporting to apply *Gore*, reduced it to a mere $1.09 billion.

That judgment, even as reduced, was 218 times greater than any California award in any published case (before *Romo*) and 19 times greater than any punitive

damage award ever affirmed in any federal court in any reported case. One year's post-judgment interest alone would be 22 times the largest award ever affirmed in a reported California case (again before *Romo*) and almost twice the largest ever affirmed in a reported federal case. No one – literally, no one – could have foreseen in the 1970s, when the tank was designed, that a manufacturer would be subjected to over a billion dollars in punishment.

The results in real cases prove there are no practical controls on the amount of punitive damages in product liability cases. Punitive damages awards are random; in just the last few years, punitive damages in automotive product liability cases against the big three American auto manufacturers (GM, Ford and Chrysler) have included $3 million (*Clark*), $15 million (*Smith*), $290 million (*Romo*), and $1.09 billion (*Anderson*). The ratio between the high and low awards – over 300 to 1 – for similar claims (alleged defects that cause severe injuries or death) and similar sized companies alone confirms that existing law provides no controls.

Massive punitive awards like *Romo*'s $290 million award, for designs that complied with federal standards and had never before caused injury, demonstrate that punitive damages have spiraled out of control in automotive litigation. Judges' failure to rein them in demonstrates that current constitutional standards do not provide sufficient lower court guidance. Indeed, the *Smith* majority opinion unintentionally proves the problem. The Kentucky Supreme Court there observed that "the reality" of "national experience" facing an automaker is that a $15 million punitive damages award is reasonably foreseeable. (*Smith* App. 19a) This circular "reality," in which each enormous award justifies the next, is the problem, not the answer.

The *Romo* and *Smith* cases give the Court an opportunity to set substantive due process limits on imposition of punitive damages, define jury instructions that will help assure adherence to those substantive limits, explain the territorial reach of jury awards, and clarify the reviewing courts' duty to control jury excesses. The Court should grant certiorari to provide that specific guidance on the constitutional limitations on punitive damages.

CONCLUSION

For these reasons, the Alliance and AIAM respectfully urge the Court to grant the Petitions.

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Respectfully submitted,

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